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deprive the defendant of a defense of limitations that he would otherwise have.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 182; Dec. Dig. § 81 (1).* 4 Va.-W. Va. Enc. Dig. 718.]

Error to Circuit Court, Dickenson County.

Action by Walter Trent against the Clinchfield Coal Corporation. Judgment for defendant dismissing the case, and plaintiff brings error. Affirmed.

Sutherland & Sutherland, of Clintwood, and *Finney & Wilson*, of Lebanon, for plaintiff in error.

W. H. Rouse, of Clintwood, and *Morison & Robertson*, of Big Stone Gap, for defendant in error.

NORFOLK & W. RY. v. PARRISH.

Sept. 11, 1916.

[89 S. E. 923.]

1. Railroads (§ 356 (1)*)—Injury on Track.—Plaintiff, who was waiting for one of defendant's trains in pursuance of an engagement to meet a passenger and proceed with him on the same train to another place, and who, when the train came in, started upon a wooden walkway from the hotel porch to the north rail of the west-bound track, entirely upon the station premises, and which was used as a passageway to the station with the defendant's knowledge and consent, and who was struck by a pusher engine while crossing the west-bound track, was an invitee upon the station premises, and not a bare licensee or trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1234; Dec. Dig. § 356 (1).* 16 Va.-W. Va. Enc. Dig. 254.]

2. Appeal and Error (§ 1002*)—Verdict—Conclusiveness.—In an action against a railroad for injury on its track, the jury's finding on conflicting evidence as to the place where plaintiff was injured was conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.* 1 Va.-W. Va. Enc. Dig. 645.]

3. Trial (§ 191 (8)*)—Instruction—Assumption of Fact.—In an action against a railroad for injury on its track, an instruction not assuming that plaintiff was going the customary way to the station when he was struck, but leaving his positive testimony that he was using the regular passageway when struck to the jury, was not objectionable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 420; Dec. Dig. § 191 (8); Railroads, Cent. Dig. § 1383.* 7 Va.-W. Va. Enc. Dig. 718.]

4. Trial (§ 203 (1)*)—Action for Injury—Instruction—Theory.—Where, if the jury believed the plaintiff's testimony, he would be an

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digest and Indexes.

invitee, he was entitled to have such theory presented in an instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203 (1).* 7 Va.-W. Va. Enc. Dig. 717.]

5. Railroads (§ 356 (1)*)—Injury on Track—Rights of Invitee.—Where plaintiff was using the regular passageway toward defendant's station over a westbound track, and was injured while crossing it, his rights would not be affected by the fact that the crossing on the other side of the station platform was obstructed by a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1234; Dec. Dig. § 356 (1).* 16 Va.-W. Va. Enc. Dig. 254.]

6. Trial (§ 252 (9)*)—Instructions—Assumption of Fact Contrary to Evidence.—In such action, where the uncontradicted evidence was that the passageway which plaintiff was using was a public way to the station, an instruction assuming that the place where he crossed the track was not a public crossing was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. § 252 (9).* 7 Va.-W. Va. Enc. Dig. 718.]

7. Railroads (§ 346 (6)*)—Injury on Track—Evidence—Presumption.—In such action, where it appeared that the engine by which plaintiff was struck was near the track when he was going over it, that it was a dark, drizzly night, that the engine was drifting backward without displaying any light, blowing any whistle, or ringing any bell, and with a curtain across the view of the engineer and fireman, there could be no presumption that plaintiff did not look or did not heed what he saw, in the face of positive evidence that he looked and listened and neither saw nor heard anything.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1122; Dec. Dig. § 346 (6).* 11 Va.-W. Va. Enc. Dig. 597.]

8. Railroads (§ 350 (13)*)—Injury on Track—Question for Jury.—In such case whether plaintiff did what under the facts and circumstances was reasonable to be expected of him was for the jury, without any expression or intimation from the court as to what weight was to be given the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350 (13).* 11 Va.-W. Va. Enc. Dig. 597.]

Error to Circuit Court, Montgomery County.

Action by J. W. Parrish against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jordan & Roop and *H. J. Phlegar*, all of Christianburg, for plaintiff in error.

Welborn & Jamison, of Roanoke, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digest and Indexes.